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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 320

MAURICE H. SCHY,

Petitioner,

v.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSON, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Statement of the Case

Petitioner is an attorney and stockholder in The Susquehanna Corporation (Susquehanna) who seeks to have this Court review every facet of the decisions of the two Courts below dismissing his purported class action under Section 14(a) of the Securities Exchange Act of 1934 (the "Act"). Both the District Court and the Court of Appeals held (1) that Petitioner did not adequately represent the class—Susquehanna stockholders—on whose behalf he allegedly

sued, and (2) that the action should be dismissed for failure to state a claim on which relief could be granted.

Petitioner brought suit in the United States District Court for the Northern District of Illinois on October 18, 1967, on behalf of himself and other stockholders "situated similarly" to enjoin the issuance of a newly-authorized class of Preferred Stock of Susquehanna.[1] Issuance of this Preferred Stock had been previously authorized by the stockholders after their votes had been solicited by a Proxy Statement for the Corporation's Annual Meeting dated March 29, 1967. Petitioner's Complaint alleged that this Proxy Statement omitted material information in violation of Section 14(a).

However, on October 26, 1967, eight days after Petitioner filed his action, Susquehanna, together with Atlantic Research Corporation, issued a Joint Proxy Statement (Merger Proxy Statement). This second Merger Proxy Statement sought stockholder approval for the proposed merger of the two corporations. It also sought stockholder approval for the *issuance* of the Preferred Stock authorized by the March 29 Statement. Because this Preferred Stock was basic to the merger plan, the Merger Proxy Statement described the terms of its issuance in exhaustive detail. In addition, the Merger Proxy Statement covered the same ground as the March 29 Proxy Statement by seeking, once again, stockholder approval of an amendment to the Certificate of Incorporation authorizing issuance of the Preferred Stock. The exact text of the Amendment was included.

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[1] Other complaints of Petitioner against this same corporation were held to be without merit after a lengthy trial in *Dasho, Dasho-Rogers, Inc. and Maurice H. Schy* v. *The Susquehanna Corporation et al.*, CCH Fed. Sec. L. Rep. ¶ 92,575 (N.D. Ill. 1970).

The Merger Proxy Statement also contained a complete summary of every aspect of Petitioner's Complaint, including the relief sought—an injunction against issuance of the Preferred Stock. At oral argument before the Court of Appeals, Petitioner's counsel admitted that this summary, as well as the rest of the Merger Proxy Statement, was complete and fair.

The stockholders, acting on the basis of the Merger Proxy Statement, voted almost unanimously—80.8% to 0.42%—to approve the Atlantic Research-Susquehanna merger. They also approved authorization and issuance of the Preferred Stock—doing so fully mindful of Petitioner's pending Complaint.

Thereafter, Respondents, relying on this stockholder repudiation of Petitioner's claims, moved for an order (1) that Petitioner could not adequately represent the class, and (2) that the Complaint should be dismissed because Petitioner had not exhausted his intracorporate remedies.

The District Court, after receiving memoranda and exhibits from both sides and hearing oral argument, held that the action could not be maintained as a class action, and that the Complaint failed to state a claim. It reached the latter conclusion after determining that the action was moot, that no damage resulted to Susquehanna's stockholders from the challenged actions, and that the Merger Proxy Statement gave full notice to the stockholders about Petitioner's Complaint.

The Court of Appeals unanimously affirmed. It agreed with the District Court's holding that Petitioner could not properly represent other stockholders, and held that summary judgment was properly granted. 419 F. 2d at 1116-17. On the merits, the Court of Appeals held that the District Court

correctly found that the March 29 Proxy Statement—the basis of Petitioner's claim—was not the cause of any corporate action, and no damage resulted from its issuance. "The shares which were issued and used to effectuate the merger were issued in response to the October 26, 1967 proxy, which the plaintiff admits was fair and complete." 419 F.2d at 1117. Any defect in the earlier proxy statement was held cured by the later Merger Proxy Statement: "Here there was no influence from the March 29, 1967 proxy statement which was unremedied by the October 26, 1967 proxy statement." 419 F.2d at 1117.

The Court further held that this Court's opinion in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 and its own opinion in *Mills* v. *Electric Auto-Lite Co.*, 403 F. 2d 429 (7th Cir. 1968), reversed 396 U.S. 375, were inapplicable because the facts of those cases are so very different.

Questions Presented

I. Whether this Court should, on the basis of its opinion in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, review the decision below, where the Proxy Statement which is alleged to be false and misleading was superseded by a subsequent Proxy Statement which was admittedly fair and accurate, the corporate action complained of being based on this subsequent Proxy Statement?

II. Whether this Court should review the decision below disqualifying Petitioner as a class representative where there is no underlying factual basis on which a substantive cause of action can be grounded?

III. Whether this Court should review the decision below disqualifying Petitioner as a class representative because his position was found to have been overwhelmingly repudiated by the class he purported to represent, and because his interests were found to conflict with those of the class?

IV. Whether this Court should grant certiorari to review the holding of the Court of Appeals that summary judgment was properly granted, where the decision on the merits is clearly correct and Petitioner's contentions as to the procedure followed below raise no genuine issues of any magnitude?

ARGUMENT

The decisions below are clearly correct, both on the merits and on the procedural questions involved. There is no conflict of decisions. The questions involved are not of general or prospective importance. Indeed, both holdings below turn on the unique factual pattern presented by this record. Accordingly, there is no occasion for further review.

I. The Decision of this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, Clearly Does Not Apply To The Factual Situation Here.

Petitioner's effort to attract the Court's interest in this case by concocting an alleged disregard of *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, by the Court of Appeals is baseless. *Mills* is inapplicable here because there is a break in the chain of causation which divorces the Proxy Statement which Petitioner's lawsuit challenges from the corporate action taken by the stockholders.

The fatal flaw in Petitioner's effort to apply *Mills* here is that it fails to take account of the fact that *two* Proxy Statements are involved. Petitioner's contention that the first one—the March 29 Proxy Statement—was "deceptive in material respects" and hence violative of Section 14(a) overlooks the fact that, as the Court of Appeals said, "The shares which were issued and used to effectuate the merger were issued in response to the October 26, 1967 [Merger] Proxy [Statement], which the plaintiff admits was fair and complete." 419 F. 2d at 1117.

Nothing was done as a result of the March 29 Proxy Statement. All that Management sought therein was stockholder approval of an amendment to the Certificate of Incorporation authorizing future issuance of the Preferred Stock. But, as the Court of Appeals noted, "No shares of preferred stock were ever issued pursuant to the March 29, 1967 proxy." 419 F. 2d at 1117.

When the Preferred Stock was issued, it was done pursuant to stockholder approval sought in the Merger Proxy Statement. Retreading ground already trod in March, this Statement sought new stockholder authorization by seeking approval of an amendment virtually identical to the one proposed in the March 29 Statement. The terms surrounding the actual issuance of the Preferred Stock—dividend, voting, liquidation and conversion rights and redemption privileges—were detailed in the new Merger Proxy Statement. This Merger Proxy Statement, which Petitioner admitted on oral argument in the Court of Appeals "was

accurate and complete",[2] 419 F. 2d at 1114, was the legal cause of the corporate action about which Petitioner complains—issuance of the Preferred Stock.

In *Mills*, this Court addressed itself to a situation wholly different from the one here. That case furnishes no basis for the grant of certiorari. In *Mills*, the proxy statement under attack was the one employed to induce stockholder approval of the merger. Petitioner's attack here is on the March 29 Proxy Statement, superseded in every respect by one which two Courts, as well as Petitioner's counsel, have said was fair and accurate. The March 29 Proxy Statement was not "an essential link in the accomplishment of the transaction", 396 U.S. 385. Indeed, it was entirely academic. Surely the instant case is a prime example of what this Court contemplated when it said that its postulation of the materiality requirement

> "adequately serves the purpose of insuring that a cause of action cannot be established by proof of a defect so trivial, *or so unrelated to the transaction for which approval is sought*, that correction of the

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[2] Petitioner's assertion that the Court of Appeals "based" its affirmance of the District Court on his counsel's admission in oral argument that the Merger Proxy Statement was fair is clearly spurious. This fabricated issue affords no basis for granting certiorari. Petitioner's counsel did make the admission. Petitioner is bound by the statements of his freely chosen agent, and the Merger Proxy Statement is, as both Courts below held, complete, fair and accurate. Moreover, even if his counsel did not make the admission, Petitioner never challenged the Merger Proxy Statement in his Complaint or his Amended Complaint, and he cannot smuggle in a new cause of action at this stage of the proceedings, or raise questions here which he did not raise below. *Neely* v. *Martin K. Eby Const. Co.*, 386 U.S. 317, 330; *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 303. See also *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700; *Edelman* v. *California*, 344 U.S. 357.

> defect or imposition of liability would not further the interests protected by § 14(a)." 396 U.S. at 384. (Emphasis added).

Here the alleged defects were so academic, so unrelated to the assailed action, that imposition of liability would do violence to Section 14(a). Lack of any possible causal connection was *prima facie* evident from the moving papers. There was no dispute below concerning the operative facts. Therefore, mindful that this case is manifestly distinguishable from *Mills*, both Courts below correctly held that Petitioner could not possibly establish a cause of action. *Mills* thus provides no ground for granting the writ.

Just as Petitioner's reliance on *Mills* is misplaced, so also is his reliance on *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431. There the Court simply held that the causation question should be resolved at trial; not in this Court. The Proxy Statement involved there, however, clearly played *some* part in the merger. Whether it had decisive effect was the issue over which there was a factual dispute. Here, however, the record is clear that the March 29 Proxy Statement was not responsible for the challenged corporate action.

II. There Is No Conflict Between the Holding Below and the Law Prevailing in the Second Circuit on the Class Action Question.

Contrary to Petitioner's assertion, there is no conflict of decisions on the class action issue. Petitioner has sought to manufacture a conflict between the Court of Appeals holding here, on the one hand, and decisions of the Second and Seventh Circuits in *Eisen* v. *Carlisle & Jacqueline*, 391 F. 2d 555 (2d Cir. 1968) and *Hohmann* v. *Packard Instrument Co.*, 399 F. 2d 711 (7th Cir. 1968), on the other hand.

Even if Petitioner's contention were sound, it would furnish no occasion for granting the writ. This is so because the two Courts below were so clearly correct in their holdings on the merits that for this Court to grant certiorari because of this alleged issue would afford only an opportunity to correct a technical error. On the merits, Petitioner's cause of action has been held to be moot. There is no possible way Petitioner can show any causal nexus between the alleged deficiencies in the March 29 Proxy Statement and the issuance of the Preferred Stock. The subsequent Merger Proxy Statement is admittedly fair. Therefore, it would be nothing short of futile for this Court to grant certiorari to correct an asserted error of adjective law where the underlying substantive claim is without legal basis.

Denial of the writ may be justified on the alternative ground, however, that the Court of Appeals decision is consistent with *Eisen* and *Hohmann*. Petitioner urged both these cases on the Court of Appeals. That Court rejected them as controlling authority because both cases merely hold that, on the issue of adequate representation, the fact that only one or two of a large class have filed suit and no others have intervened is not dispositive. Neither case dealt with the situation here, where a large majority of the class, on being fully informed of Petitioner's claims as their representative (as they were in the Merger Proxy Statement), repudiated him as their representative by voting almost unanimously[3] to authorize and issue the Preferred Stock (to which his Complaint objected) and to use it in the merger.

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[3] As the Court of Appeals stated: "After being fully informed of the nature of plaintiff's pending suit, 80.8% of the stockholders voted in favor of the proposal made in the October 26, 1967 proxy statement. . . . Only 0.42% voted against it." 419 F. 2d at 1117.

In *Eisen*, the Court of Appeals reversed the District Court's holding that the Plaintiff there was not a proper representative because he was the only member of a large class who had sued and because no other members had sought to intervene. The essence of the Court's holding is in the following passage:

> "We are not persuaded that it is essential that any other members of the class seek to intervene. . . . If we have to rely on one litigant to assert the rights of a large class then rely we must. . . .
>
> "Necessarily, a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation, [citation], but the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate." 391 F.2d at 563.

Thus *Eisen* simply held that a class action could not be dismissed solely because other members of the class were silent and had not sought to intervene. But here the Court of Appeals laid stress on the fact that the stockholders massively repudiated Petitioner's gratuitous efforts by their informed vote to authorize and carry out the very action his lawsuit sought to block.

Hohmann, which like the instant case was decided by the Seventh Circuit, followed *Eisen* and cited it with approval. In *Hohmann*, the Court's holding was also limited to the narrow point that "whether other members of the class have sought to intervene is not determinative of the question whether the plaintiffs are qualified to act in behalf of absent members of the class." 399 F. 2d at 714.

Both *Eisen* and *Hohmann*, therefore, dealt with the narrow question of what inferences a Court could properly draw from silence and inaction by other members of a class. In *Schy*, the Court dealt with the inference to be drawn from the affirmative action taken by members of the class to repudiate the essence of the cause of action. The cases are thus plainly distinguishable. The decision of the Court below is also squarely in accord with decisions of other Courts of Appeals on the same issue.[4] There is therefore no conflict between the Circuits warranting issuance of a writ.

Rather than "leaving conflict in its wake" as Petitioner asserts, the Court below was faithful to decisions of this Court in purported class action cases. The Court of Appeals properly relied on this Court's holding in *Hansberry v. Lee*, 311 U.S. 32, 44-45 and *Carroll v. American Federation of Musicians*, 391 U.S. 99, 103, Note 4, which also involved situations where substantial portions of a class took positions contrary to that of their self-appointed representative. There is thus no occasion for further review.

Certiorari should also be denied on the additional ground that the representation question presented here arises from the unique facts of this case. Petitioner is an attorney. His counsel below filed an Affidavit with the District Court stating that there was an agreement that Petitioner would share in whatever attorney's fees might be allowed. Both Courts below indicated that, because of this fact and because of

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[4] *Troup* v. *McCart*, 238 F. 2d 289, 294 (5th Cir. 1956); *Giordano* v. *Radio Corporation of America*, 183 F. 2d 558, 560 (3rd Cir. 1950); *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629, 632 (7th Cir. 1940); *Carroll* v. *American Federation of Musicians*, 372 F. 2d 155, 162 (2d Cir. 1967), vacated on other grounds, 391 U.S. 99; see also *Crawford* v. *Texaco, Inc.*, 40 F.R.D. 381, 385 (S.D.N.Y. 1966); *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466, 483 (S.D. Calif. 1957).

the stockholders' repudiation of Petitioner's position, his interests conflicted with those of the class. The lack of direct authority on the issue—the Petition for Certiorari cites none—indicates that the question can hardly be said to be of widespread and recurring importance to the Federal Courts. Should the question arise in the future, its resolution by the two Courts below provides ample guidelines for decision consistent with the language and purposes of Rule 23, F.R.C.P. Determination of this aspect of the case below thus eliminates any need for further consideration by this Court.

III. There Is No Occasion For This Court To Review The Procedure Followed By The District Court In Dismissing Petitioner's Complaint.

The lack of merit in Petitioner's position is nowhere more clearly demonstrated than in his lengthy argument that he was denied due process of law by the trial Court's granting of summary judgment in this case. Petitioner's argument, essentially an effort to have this Court second guess every action of the District Court, is not supported by authority and raises issues which have already been considered by another appellate tribunal. None of Petitioner's numerous contentions is of sufficient magnitude to justify review here.

Prior decisions of this Court cited by Petitioner are plainly distinguishable. Thus, the language from *Conley* v. *Gibson*, 355 U.S. 41, 48 (Petition, p. 16) concerned an argument by respondents there that the Complaint therein, filed by Negro employees contending their union was not representing them fairly, "failed to set forth specific facts to support its general allegations of discrimination and that

its dismissal is therefore proper." 355 U.S. at 47. Respondents here, however, did not seek dismissal because of defective pleading, but because Petitioner was disqualified as a class representative who had no legally cognizable claim.

Similarly, Petitioner wholly misconstrues this Court's decision in *Surowitz* v. *Hilton Hotel Corp.*, 383 U.S. 363, 373. Petitioner, himself an attorney, was represented in both courts below by a nine-member law firm, yet he seeks by inference to put himself in the same category as the "unsophisticated litigant" so summarily dealt with by the trial Court in *Surowitz*. There it was apparent that, as the Court of Appeals had noted, "many of the material allegations of the complaint are true and cannot be refuted", 342 F. 2d at 607, yet the District Court dismissed without requiring any response from Defendants. In language ignored by Petitioner, this Court held:

> "We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, *without any answer or argument at all*, cases like this whose grave charges of fraud are shown on the record to be based on reasonable beliefs, growing out of careful investigation." 383 U.S. at 373. (Emphasis added).

Here, an Answer was filed. A hearing was held. Respondents' Motion, together with Exhibits, was filed on July 17, 1968, and oral argument on the Motion was held some three months later, on October 15, 1968—adequate time for Petitioner and his counsel to prepare. Here too, unlike *Surowitz*, Petitioner previously had filed a Motion for Summary Judgment, which he subsequently withdrew but

later renewed. And, unlike *Surowitz*, the Complaint here can hardly be said to be "based on reasonable beliefs growing out of careful investigation."

Petitioner's citation of *Foman* v. *Davis*, 371 U.S. 178, to support his contention that the District Court wrongly denied him leave to amend, is also wide of the mark. *Foman* involved a situation worlds apart from that here, and held that a District Court should have granted leave where the proposed amended complaint would have done no more than state an alternative theory. 371 U.S. at 182. But here the proposed new pleading was identical in all material respects with the original pleading except that it included a claim for money damages. Leave to amend would thus have been futile.

Conley, *Surowitz* and *Foman*, like the other decisions[5] relied on by Petitioner, are thus factually distinguishable and furnish no authority for granting certiorari.

Apart from the fact the Petitioner has not cited any authority in point, the Court should deny certiorari for the additional reason that the arguments raised by Petitioner about the District Court's dismissal have been fully considered by the Court of Appeals and found to be either inaccurate or without merit. Thus, Petitioner intimates that his counsel was taken by surprise by Respondent's

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[5] *Anderson National Bank* v. *Luckett*, 321 U.S. 233, *Schroeder* v. *City of New York*, 371 U.S. 208, and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, cited in the Petition (p. 18), all involved the question whether statutory notice provisions comport with due process requirements. Petitioner, however, does not challenge the notice provisions of the Federal Rules of Civil Procedure. Petitioner's reliance on *Hannah* v. *Larche*, 363 U.S. 420, 442 (Petition, p. 18) is mystifying, since that case concerns the due process rights to be accorded by investigative agencies, an issue wholly irrelevant here.

moving to dismiss for failure to state a claim. Respondents' Motion to Dismiss had been grounded on Petitioner's failure to exhaust his intracorporate remedies. But, when Respondents raised the Rule 12(b)(6)[6] defense at the oral argument on the motion, Petitioner's counsel, rather than objecting or indicating he was unprepared, argued strenuously and at length that Respondents were wrong in asserting that there was no damage to the corporation. Petitioner cannot now contend that he was taken by surprise. As the Court of Appeals held, ". . . the plaintiff fully argued this ground at the hearing and cannot complain here that the district court considered it. [citing cases]." 419 F. 2d at 1115. Moreover, the defense of failure to state a claim had been raised in the Answer and the Answer was before the Court.

Similarly, Petitioner's objection to Exhibits accompanying Respondents' motion to dismiss comes late in the day. As the Court of Appeals held, "The plaintiff did not complain of untimeliness in the trial court, although he did urge the court not to consider the exhibits as evidence. Since the plaintiff did not complain about the late filing in the trial court, he cannot do so on appeal." 419 F.2d at 1116. *Georgia Southern and Florida Railway Co.* v. *Atlantic Coast Line Railway Co.*, 373 F. 2d 493 (5th Cir. 1967) does not support petitioner's position. There, the losing party had no notice before a hearing on a motion for preliminary injunction that "a final judgment would result from it." 373 F. 2d at 497. Here, Petitioner had known for three

[6] This Rule provides:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses at the option of the pleader may be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . ."

months that Respondents would seek dismissal of his Complaint. Petitioner came to the hearing prepared to argue against the dismissal. Petitioner also knew from Respondents' Answer that they relied on the Rule 12(b)(6) defense.

In challenging as he does the conclusion of the Court of Appeals that "the procedure followed by the district court in granting summary judgment did not involve reversible error." 419 F. 2d at 1116, Petitioner appears to be asking this Court to assume the role of a trial Court and hear once again his objections to Respondents' Motion to Dismiss. That is not this Court's function. Hence it should deny certiorari on this as well as on the other grounds stated in this Brief.

CONCLUSION

The Petition for Certiorari raises no issue of sufficient magnitude to justify consideration by this Court, points to no conflict of decisions, and shows no error by the Courts below. It is therefore respectfully urged that the Petition should be denied.

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